

2002798 (Migration) [2021] AATA 1875 (31 March 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 2002798

MEMBER: Hugh Sanderson

DATE: 31 March 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 31 March 2021 at 10:17am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – no substantive visa at application lodgement – compelling reasons to waive the Schedule 3 criteria – relationship ceased – withdrawal of sponsorship – family violence claims – mental health issues – credibility issues – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 359

Migration Regulations 1994, Schedule 2, cl 820.211; Schedule 3

CASES

Babicci v MIMIA (2005) 141 FCR 285

Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2013) 250 CLR 503, 519

MZYPZ v MIAC [2012] FCA 478

Plaintiff M64/2015 v MIBP [2015] HCA 50

Singh v Minister for Home Affairs [2020] FCCA 3180

SZEXP v MIBP [2015] FCAFC 69

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 25 May 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the delegate found the applicant did not hold a substantive visa at the time of the application and did not satisfy the Schedule 3 criteria. Further, the delegate was not satisfied there were compelling reasons for not applying those criteria.

Background

4. The applicant was born in Georgia and is currently [age] years old. She was previously married and has two children from that marriage, [one] who is currently [age] years old and [the other] who is currently [age] years old. Her children continue to reside in Georgia as does her [sibling]. She divorced her husband in Georgia [in] December 2017.
5. The applicant first arrived in Australia [in] July 2013 holding a Subclass 600 Visitor visa. She applied for a Protection visa on 18 October 2013. This application was refused by the Department on 11 September 2015 and that decision was affirmed by the Tribunal (differently constituted) on review on 20 October 2017. The applicant appealed that decision to the Federal Circuit Court, however, withdrew that appeal [in] July 2018.
6. The sponsor of the applicant was [Mr A]. He was born in [Country 1] and is currently [age] years old. He was previously married and has [number] adult children from that relationship. He divorced his wife in 2010. He is an Australian citizen.
7. When the application was made, the applicant claimed that she had met the sponsor in April 2014 in a Russian restaurant and as they liked each other they started living together as boyfriend and girlfriend. They were married [in] December 2017.
8. The applicant's agent at the time noted the applicant did not hold a substantive visa and did not satisfy the Schedule 3 criteria. The agent submitted that the following issues were compelling reasons for not applying the Schedule 3 criteria:
 - The applicant had not deliberately manipulated her circumstances to give rise to compelling reasons;
 - The fact that her Protection visa application was refused was a circumstance beyond her control;
 - The applicant fears returning to Georgia and cannot return there to apply for a Partner visa;
 - The parties had been in an exclusive relationship for four years at the time of the application;

- The sponsor suffers from a myriad of ailments and he would not have the applicant's support if she were required to apply for a Partner visa offshore; and
 - The applicant had always complied with Bridging visas granted to her.
9. On 21 August 2018 the applicant's agent wrote to the Department requesting a variation of the applicant's Bridging visa to allow her to return to Georgia to visit her family. The Department responded, noting that the Bridging visa granted to the applicant did not allow her to return to Australia unless she was granted an offshore visa.
 10. The sponsor contacted the Department on 7 November 2018, withdrawing his sponsorship of the application. The Department wrote to the applicant with this information requesting a response or further information. The applicant responded by claiming that she had suffered relevant family violence committed by the sponsoring partner. A final Apprehended Violence Order (AVO) was provided dated [in] May 2019.
 11. The applicant provided a variety of documents in support of her application, both in support of the claim that she had been in a genuine relationship with the sponsor and that she had suffered relevant family violence. This included statements from the applicant made to the police in 2015, statements from various counsellors and support people in respect of the criminal proceedings instituted against the sponsor, medical reports and police statements.
 12. Based on the various statements and police reports provided by the applicant, the following is an outline of the applicant's relationship:
 - The parties first met in April 2014 when the sponsor offered the applicant a job in his [occupation 1] business;
 - The applicant claimed that she was desperate for a job and a friend told her about [an occupation 1] service and she contacted the sponsor, whose [occupation 1] service it was, who was looking for somebody to work in his [occupation 1] business;
 - The applicant got a job with the sponsor as [an occupation 1];
 - The relationship between the applicant and the sponsor developed and the applicant would stay with the sponsor almost every night of the week;
 - In statements to the police in 2015, the applicant claimed that she was living in her own home, but the sponsor would force her to have sex with him;
 - Since the start of the relationship, the applicant was subjected to various forms of domestic violence from the sponsor, including being choked, slapped, pushed, verbally abused, sexually assaulted, and threatened with the unauthorised release of sexually explicit photos;
 - As the applicant was desperate for work, she felt obliged to agree to work for the sponsor who demanded she have sex with him;
 - An AVO was issued for the protection of the applicant against the sponsor [in] February 2015 and was made for a period of 12 months;
 - The sponsor was never charged with or convicted of any assault or any other offence as a result of the allegations made by the applicant;

- After three months, the applicant reported the sponsor to the police for breaching the AVO by contacting her;
- In about June 2015, the AVO was withdrawn and the applicant continued to work for the sponsor, although the sponsor continued his abusive behaviour towards her as he was jealous of another worker who he believed was having an affair with the applicant;
- The applicant provided various examples of the sponsor assaulting her in 2017 and 2018;
- The applicant moved out of the sponsor's home in September 2018 after he assaulted her;
- The applicant was admitted to hospital for two days in October 2018;
- After further threats from the sponsor, the applicant reported matters to the police [in] October 2018 and she applied for a further AVO;
- [In] February 2019 an interim AVO was made and a final order was made [in] May 2019;
- No criminal charges were brought against the sponsor as a result of the allegations made by the applicant; and
- The applicant had been accessing various support services, including consulting with [Doctor A] of [Hospital A], [Ms A], counsellor from [Agency 1], [Doctor B], consultant psychiatrist, and [Ms B], mental health therapist.

13. The applicant's agent made submissions where the following were claimed to be compelling reasons for not applying the Schedule 3 criteria:

- The main compelling reason is that the applicant has suffered family violence committed by the sponsor;
- The circumstances of the applicant have not been deliberately manipulated or created by her;
- As the relationship between the applicant and the sponsor has ended, it is not possible for the applicant to now leave Australia to apply for an offshore Partner visa;
- There is no history of non-compliance by the applicant and she has always maintained a lawful status in Australia;
- The applicant applied for a Protection visa when she had a substantive visa but was not in a spousal relationship within 28 days of her last holding a substantive visa;
- The protection that is offered to a victim of family violence is so that they do not have to remain in an abusive relationship for the sake of the visa, and this would be denied to the applicant if she were not granted a waiver of the Schedule 3 criteria;
- The family violence the applicant has suffered includes physical, sexual and psychological abuse and has had a debilitating impact on her personal life;

- The applicant is undergoing further treatment as a result of the injuries suffered by her from the family violence;
 - The applicant has no other option available to her to be able to remain in Australia; and
 - The circumstances leading to the applicant not satisfying the Schedule 3 criteria are not due to the applicant showing any disregard for Australia's immigration laws, but simply due to the fact that she was not in a relationship when she held a substantive visa.
14. The applicant appeared before the Tribunal on 23 March 2021 to give evidence and present arguments. The Tribunal also received oral evidence from her counsellor, [Ms B]. The Tribunal hearing was conducted with the assistance of an interpreter in the Russian and English languages. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
 15. The Tribunal commenced the hearing by explaining to the applicant the process under s.359AA of the Act. The Tribunal explained to the applicant it would be putting to her information which would be the reason, or a part of the reason, for affirming the decision under review. It would explain what this information was, why it was relevant and invite the applicant to comment on or respond to the information. If she required more time, she could request an adjournment.
 16. The applicant provided details of where she was currently living and her financial support. She said that she speaks to her son every day, but does not speak to her daughter because her daughter has not forgiven her for deciding to get married in Australia. She said that her son is a [professional] in Georgia. She was not able to provide many details of his work, but said that he was a very smart [professional]. She said that he owns the unit in which he lives with his wife and [children]. She said that since she left Georgia her son has travelled overseas, but was not sure where he has travelled.
 17. The applicant said that she speaks to her [sibling] in Georgia about once in every six months. She said that her [sibling] is single and is renting a place. She said that [her sibling] works looking after sick people.
 18. The applicant said that it was very difficult for her to arrange to get divorced in Georgia. She said that she had to rely on her son to apply for the divorce on her behalf. She said the papers had to be written up and signed before a notary public. She said that she had to do this on Skype while her husband, who suffers from [a medical condition], had difficulty in arranging a meeting so that he could sign the documents. She confirmed that it was she who initiated the divorce proceedings and arranged for her son to do this for her.
 19. The Tribunal asked the applicant to describe how she first met the sponsor. She said that they met in a Russian restaurant. She said that she was with a friend, [Ms C], who knew the friends of the sponsor. After being introduced, she said that they started talking to each other and their relationship developed. She said that she only started working with the sponsor about two or three days later when the sponsor found out that she was looking for work and he said that he had plenty he could offer her.
 20. The Tribunal referred to the statements the applicant had provided to the police in 2015 in support of her claims that she had been assaulted by the sponsor. In those statements, the applicant claimed that she had been looking for a job and had asked a number of people if they knew anyone who could offer her a job. She then contacted the sponsor in response to

a job advertisement placed by the sponsor. She was not sure if she contacted him first or the sponsor may have contacted her after she had left her phone number.

21. The applicant initially stated that what she had told the police was correct, but that it just so happened that the person she met in the restaurant was the same person who she had contacted to obtain work. She said that she had provided the statement to the police because they needed to have a witness to verify her first contact with the sponsor. The Tribunal noted that if the police needed a witness, she could have referred to [Ms C] who she claimed was with her when she claimed she first met the sponsor in a Russian restaurant.
22. The applicant then said that she would now tell the Tribunal the truth. She said that she knew the events would not go as well as expected and so she had not provided the truth. She said that what she had told the police as to how she had first met the sponsor was the truth. She said she had not provided the truth when she claimed she had first met the sponsor in a Russian restaurant.
23. The Tribunal asked the applicant why she had provided the false narrative of having met the sponsor at a Russian restaurant. The applicant claimed that it was because the sponsor had forced her to say this and that this was the only reason why she had said that she had met him in a Russian restaurant. The sponsor confirmed that she had no contact with the sponsor since September 2018. The Tribunal asked the applicant why she had provided the false narrative about meeting the sponsor in a Russian restaurant in statements sworn by her in 2019 and to the Tribunal at the hearing today. The applicant said that she was sorry.
24. The applicant said that at the start of the relationship the sponsor was working as [an occupation 1] and, although she was not working, she would help him each night. She said that the sponsor had two units, one being in [Suburb 1], and she retained her accommodation provided by [Charity 1] in [Suburb 2]. She said that they lived together either in the [Suburb 1] property or in the [Suburb 2] property. Where they stayed that night would depend on where their next job was. She said that [Charity 1] said that she would have to pay rent and the sponsor saw them and made arrangements to pay \$[amount] per week for the rent on the [Suburb 2] property.
25. Although claiming that she did not work for the sponsor, she said that the sponsor taught her how to be [an occupation 1]. She said that he was doing the work and she went with him to help him, but said she did not work for him. She said that occasionally he would employ other people but only on a temporary basis.
26. The applicant confirmed that there had been no criminal charges brought against the sponsor as a result of the allegations she made in 2015. The AVO was made [in] February 2015. She said that on 19 March 2015 the sponsor contacted her and was crying and asked her to withdraw the AVO. She said that she and the sponsor went to the court and told them a story that they had just met in the street and she wanted the AVO withdrawn; this was in May or June 2015. She said what she told the court at that time was not true.
27. The applicant said that the sponsor was constantly abusing her, but she was blind in life and love and she remained with him. She said the assaults continued throughout the relationship. She said that she was paid a victims' compensation payment in 2020 of \$ [amount]. She said that money had been used to repay debts and other things. She was not sure if the AVO granted to her in May 2019 was made by consent or if the sponsor had been charged with any criminal offences as a result of her allegations.

28. The applicant said that she sees a psychiatrist, [Doctor B], once every month. She said that she is taking medication to calm her down and antidepressants. She said that she had been doing this for about six months.
29. The Tribunal asked the applicant what countries she had travelled to. She said that she had travelled to [Country 2] and [Country 3]. She provided her passport which showed that she had been given a Schengen visa in October 2012, May 2012 and April 2011. She confirmed that she had travelled to [Country 2] and [Country 3] over these periods. She said that she believed she had travelled to other areas. She confirmed the passport details that she had travelled to [Country 4] and [Country 5] in February 2012. She said that before her current passport had been issued in 2011, she had travelled to many other countries in Europe and also to [Country 5].
30. The Tribunal referred to the process under s.359AA of the Act. The Tribunal referred to the decision of the Tribunal to refuse her Protection visa application. This was relevant as the Tribunal had canvassed all issues raised by the applicant as to why she could not return to Georgia. The decision found that she was not a witness of truth and that she did not meet the criteria for the grant of the Protection visa that she could not return to Georgia. This was relevant as there had been a finding that she was not a credible witness and the claims that she could not return to Georgia had already been assessed and found not to be valid. This could lead the Tribunal to conclude that the applicant did not face any difficulties in returning to Georgia and that this would not be a compelling reason for not applying the Schedule 3 criteria.
31. The applicant said that she understood what the Tribunal had said in respect of her Protection visa application but did not know why they would find that her claims were false. She said that ever since she has been in Australia, she has not been able to return to Georgia. She said that she could only return to Georgia if there was a change of government. She said that if she returned to Georgia it is likely that she would be arrested immediately due to the claims that she had previously raised.
32. The Tribunal noted that the applicant's agent had contacted the Department in August 2018 asking that the applicant wished to "travel to Georgia for a short period to visit family". This was relevant as it indicated that the applicant was wishing to return to Georgia and that there was no reason why she could not return there. The applicant claimed that the sponsor had wanted them to travel to [Country 1], where he was from, and it was all the sponsor's idea. She said that it was like claiming they had met in a Russian restaurant, that the sponsor was telling her to say that she wanted to go to Georgia and that the lawyer was doing everything the sponsor told him to do.
33. The Tribunal noted that the applicant claimed to have been [an occupation 1] in Georgia working in a very responsible position. It was noted that reports provided by the applicant had described her as being an intelligent person. It seemed unlikely, therefore, that the applicant would have signed false statements and included incorrect information in legal documents she was providing. The applicant said that she was [an occupation 1] with multiple degrees, but she has now lost everything and does not recognise herself. She said that she was a victim of love.
34. [Ms B] gave evidence in support of the application. She repeated much of what she had stated in her earlier letters. She said that she had known the applicant for the last 12 months and sees her each week and speaks to her over the phone more often. She said that the applicant was in an unenviable position and needs medical treatment in Australia for her [health conditions]. She said that the medical services are available in Georgia if you can pay for it, but the applicant would not be able to meet the costs of medical treatment in

Georgia. She said that the services in Australia are free, so the applicant needed to remain in Australia to receive the medical treatment.

35. [Ms B] said the applicant was an honest person and she believed everything she had told her. She said that she had checked up on her claims and all the claims made by the applicant were true. The Tribunal asked [Ms B] where the applicant had first met her sponsor. She said the applicant first met the sponsor in a café or restaurant and that was where their relationship began. She confirmed that this was what the applicant had told her. When the Tribunal put to [Ms B] that the applicant had now said this was not the truth, [Ms B] did not know how to respond. She confirmed that she believed the applicant was a truthful person and believed what she had told her.
36. After the hearing, the applicant's agent provided submissions as to different aspects of the applicant's evidence. This included the following:
- Although acknowledging that she had provided incorrect information to the Department and to the Tribunal about how she first met her husband, the fact that she gave incorrect information should be considered in light of the controlling and coercive behaviour of the sponsor and that the applicant had lost the autonomy and confidence about aspects of her life and felt compelled to follow the instructions of her husband;
 - Although the Tribunal had previously found against the applicant's Protection visa application, the Tribunal should give weight to the applicant's subjective fear of returning to Georgia; and
 - The applicant would suffer further harm as a woman who experienced family violence and suffers from mental health issues on being returned to Georgia.
37. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

38. The issue in the present case is whether the applicant meets the Schedule 3 criteria and, if she does not, whether there are compelling reasons for not applying those criteria.
- Does the applicant meet the Schedule 3 criteria, or are there compelling reasons for not applying those criteria?**
39. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003 and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
40. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

41. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2). In the circumstances of the applicant, the relevant day is the last day she held a substantive visa.
42. The last substantive visa held by the applicant was her Subclass 600 Visitor visa which expired on 22 October 2013. This was more than four years prior to the applicant applying for the Partner visa.
43. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

44. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
45. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
46. The Tribunal did not find the applicant a truthful witness. The applicant, in relation to the Partner visa application, claimed that she first met the sponsor in a Russian restaurant and their relationship developed from then. She made this claim when the application was first made, she repeated the claim to the Department and to the Tribunal in statements provided after her claimed relationship with the sponsor had ended, and repeated this claim before the Tribunal at the hearing. She has provided this narrative of the claimed relationship to [Ms B] and it is likely she has repeated that narrative to other treating medical professionals. The applicant, during the hearing, acknowledged that this was a false narrative. She acknowledged the statements she provided to the police in 2015 were correct, which were that she contacted the sponsor in order to try to find work and she had not met the sponsor for the first time in a Russian restaurant.
47. In the hearing before the Tribunal, the applicant initially claimed that the two stories she provided were correct, in that it was just a coincidence that the person she contacted looking for work just happened to be the sponsor who she had met previously at the Russian restaurant. When the Tribunal pointed to flaws in this narrative, she then changed the story to claim that she had provided the false narrative to the police in 2015 because she needed to identify a witness to confirm that was how they met and she could rely upon the person who she had spoken to who had first recommended that she contact the sponsor. It was only when the Tribunal pointed to flaws in this narrative that the applicant acknowledged that her claim that she had met the sponsor in a Russian restaurant was not the truth.
48. The applicant has also provided inconsistent information as to her work in Australia. Before the Tribunal, she claimed that she did not work in the sponsor's [occupation 1] business, but only went with him to "help" him in his business. She claimed that she was not working for him. This is inconsistent to the claims that she made to the police and 2015, including the fact that she first contacted the sponsor because she was looking for work. It is also

inconsistent with the information as to what she was doing with the sponsor, including the claim that the sponsor provided her training to work as [an occupation 1].

49. The applicant claimed she provided false information to the Department and to the Tribunal because the sponsor had made her do it. The Tribunal accepts that people who have suffered family violence will often be so influenced by the perpetrator of that violence that they will provide false statements as to different aspects of the relationship or indeed other aspects of their life and activities. This may include continuing a false narrative even after the relationship has ended. The Tribunal does not accept, however, that the applicant was forced to provide false information about the alleged commencement of her relationship with the sponsor or her work with the sponsor over the course of that relationship.
50. There would be no reason for the sponsor to require the applicant to provide a false narrative as to how they first met when that claim was made when the application was made to the Department. It was claimed that the relationship ended in September 2018. The applicant has not had any further contact with the sponsor since then. If this is the case, there would be no reason why the applicant would maintain a false narrative as to how her relationship commenced with the sponsor if she only provided this false narrative because the sponsor had required her to do so. The applicant has provided this false narrative not only to the Department and to the Tribunal, but to other health workers she has consulted. If these health workers are providing her assistance as a result of any family violence committed by the sponsor, the Tribunal does not accept that the applicant would maintain a false narrative as to the start of the relationship if it was not her own independent decision to do so. The applicant maintained the false narrative as to the start of her relationship with the sponsor in the hearing before the Tribunal. When this narrative was challenged by the Tribunal, the applicant then provided further false claims to try to justify her original narrative as to the start of the relationship. Again, the Tribunal does not accept that the applicant would have been influenced by anything said or done by the sponsor more than two years after that claimed relationship had ended to provide these further false claims which, when the Tribunal pointed out the flaws in the claims made by the applicant, she acknowledged.
51. The applicant acknowledged before the Tribunal that the false narratives had been provided as she believed if the truth had been provided "it would not go as well as expected". This indicates the applicant is willing to provide false narratives as to different aspects of her life and her relationship with the sponsor to attain an immigration outcome she desires. Similarly, the Tribunal finds the applicant's claim that she only provided "help" to the sponsor in his business rather than was working for him again indicates the applicant is willing to provide false information because she believed that by acknowledging she was working for the sponsor would be indicating that she was working without work rights and undermine her claims for the grant of the Partner visa.
52. For the above reasons, the Tribunal finds the applicant has been willing to provide false information both to the Department and to the Tribunal for the purpose of supporting her application and to obtain an immigration outcome she desires. This does not mean that the Tribunal does not accept all the information provided by the applicant. It does, however, indicate the applicant is willing to manipulate the information she has provided and to provide false information to the Department and to the Tribunal so that it might go as well as she hopes, rather than be open and truthful.
53. When the Partner visa application was made, the applicant claimed that she had been in a long-standing relationship with the sponsor and that the sponsor suffered from medical conditions which meant he was dependent upon the applicant.
54. The Tribunal has not made any critical assessment of whether at the time of the application the parties were in a genuine, continuing and exclusive relationship. The Tribunal has

accepted at face value the claims made by the applicant that they were in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision.

55. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship. The Tribunal has considered all the aspects of the relationship, including the fact that the parties claim to be in a relationship, the length of the claimed relationship, the nature and the extent of the bonds between the parties, and the consequences of any separation even if only for a limited time while an offshore application is being processed when considering if there are compelling reasons for not applying the Schedule 3 criteria.
56. It is claimed that the parties are in a long-standing relationship and this provides a compelling reason for not applying the Schedule 3 criteria. This submission relies upon, in part, the Explanatory Statement. The Explanatory Statement, providing examples of compelling reasons, states:
 57. where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).
58. The Tribunal is required to apply the legislation, which states that it must be satisfied there are compelling reasons for not applying the Schedule 3 criteria. As is stated in *SZEXP v MIBP* [2015] FCAFC 69 at paragraph 17:
 59. Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it "cannot displace the meaning of the statutory text" and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503, 519.
60. The Explanatory Statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. As was stated by Logan J in *Singh v Minister for Home Affairs* [2020] FCCA 3180 at paragraph 8:
 61. A statement in an explanatory statement in respect of subordinate legislation cannot be a substitute or proxy for its text any more than an explanatory memorandum can be in relation to the text of a statute.
62. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties have upon each other and all other relevant factors must be considered. As is made clear in the Explanatory Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.

63. The relationship between the applicant and the sponsor was claimed to have started in 2014. It was claimed it had been in existence for four years at the time of the application. The evidence based on the statements the applicant provided to the police and her current claims of having suffered family violence indicates that any relationship between the applicant and the sponsor was dysfunctional and punctuated by periods of separation and significant allegations of family violence. The applicant applied for and was granted an AVO for her protection from the sponsor in 2015. The evidence of the applicant before the Tribunal was that the sponsor continued to be violent and controlling of her after their reconciliation and throughout the relationship. The relationship has now ended, and the applicant has not had any contact with the sponsor since 2018.
64. It was claimed that the sponsor was dependent upon the support of the applicant due to his medical condition. The only evidence of the medical conditions suffered by the sponsor was a letter from his doctor dated 30 January 2018. There was no evidence of any dependence the sponsor had upon the applicant at that time or at any time after that due to any medical condition that he was suffering from. The sponsor continued to work in his business as [an occupation 1] throughout the claimed relationship. The applicant was also with the sponsor claiming to “help” him, but the Tribunal finds that she was working for him. The tax returns of the sponsor provided by the applicant to the Department shows that he was able to successfully work and earn an income throughout their relationship. There is nothing to indicate that the sponsor was incapacitated for any reason which would have made him dependent upon the applicant. The sponsor has [number] children living in Australia who would be able to provide him any support if he needed any. The relationship between the applicant and the sponsor ended in 2018.
65. The Tribunal does not accept the parties were at any time dependent upon each other for any reason and the relationship appears to have been dysfunctional and punctuated by periods of separation. The Tribunal does not accept the sponsor was suffering from any medical condition which meant that he was dependent upon the support of the applicant at any time. The Tribunal is not satisfied that anything in the claimed relationship between the applicant and the sponsor provides a compelling reason for not applying the Schedule 3 criteria.
66. It was claimed that the applicant had always been lawfully in Australia and that she had always complied with the Bridging visas granted to her. The Tribunal has significant concerns that the applicant was working in Australia in breach of any Bridging visa granted to her. For the purpose of this decision, however, the Tribunal accepts that the applicant throughout her time in Australia has held a valid visa and she has not breached any conditions of any visa granted to her.
67. The Tribunal does not accept that simply the fact that the applicant may have held a valid visa while in Australia and not committed any criminal offences or breached the conditions of her visa provides a compelling reason for not applying the Schedule 3 criteria.
68. The applicant did not hold a substantive visa at the time of the application. She is required, therefore, to satisfy Schedule 3 criteria 3001, 3003 and 3004 unless there are compelling reasons for not applying those criteria. The applicant does not meet criterion 3001 as she had not held a substantive visa for at least 28 days prior to the last day she held a substantive visa. The issue of whether she meets the relevant Schedule 3 criteria does not make any provision as to whether the applicant held a non-substantive visa (i.e. a Bridging visa) to indicate that she would meet the criteria. All that is being claimed by the applicant is that she did not commit any criminal offence or remain in Australia as an unlawful noncitizen at any time. The Tribunal finds that all the applicant has done over the period that she has remained in Australia is the very minimum that would be expected from any individual. That is, that they comply with Australia’s laws, both criminal and immigration. The Tribunal does

not accept that the applicant meeting the very basic requirements for any individual in Australia provides a compelling reason for not applying the Schedule 3 criteria.

69. It was claimed the applicant has not manipulated her circumstances. The applicant arrived in Australia on a Visitor visa. She then applied for a Protection visa, which was found to have no merit. That application was refused by the Department and the Tribunal affirmed that decision on review. An appeal by the applicant against that decision was withdrawn.
70. As discussed below, there is no information before the Tribunal which would indicate the decision of the Department and the Tribunal on review refusing the applicant the Protection visa was not a correct decision and a proper assessment of the information provided by the applicant in support of that application. The Tribunal does not accept that even if it is accepted that the applicant has not manipulated her circumstances to be able to remain in Australia that this provides a compelling reason for not applying the Schedule 3 criteria. It is again the minimum expectation of an individual that they do not manipulate their circumstances when applying for a visa. The Tribunal does not accept that even if the applicant has not manipulated her circumstances that this would provide a compelling reason for not applying the Schedule 3 criteria.
71. The applicant claimed that it was due to circumstances beyond her control that her Protection visa was refused and she therefore did not hold a substantive visa. The Tribunal does not accept this. The application for the Protection visa was found to be without merit. The claims made by the applicant were not accepted. Accordingly, based on that decision it would appear that the applicant had no genuine grounds for bringing the Protection visa application. The fact that it was refused was because the applicant had brought an unmeritorious application. The Tribunal does not accept that because the applicant brought and unmeritorious application for a Protection visa and her application was refused that she did not hold a substantive visa due to circumstances beyond her control. The Tribunal does not accept that the fact the applicant was refused the Protection visa and did not hold a substantive visa provides a compelling reason for not applying the Schedule 3 criteria.
72. The applicant has now claimed that her relationship with the sponsor has ended. It is claimed that if she were required to return to Georgia, she would not then be able to apply for a Partner visa as she is no longer in that relationship. It is claimed further that she has suffered family violence committed by the sponsoring partner. It was argued that if the applicant was assessed as not meeting the Schedule 3 criteria and therefore not meeting the time of application criteria in cl.820.211 that she would then be denied the opportunity of having her application assessed at the time of the decision under the family violence provisions.
73. It was argued further that the family violence provisions were introduced to allow applicants in a violent relationship to leave those relationships, knowing that it would not adversely affect the assessment and grant of their application for a Partner visa. If the Schedule 3 criteria is not waived on the basis that the applicant has suffered family violence, it would then have the effect of forcing a person who is in a violent relationship and who did not meet the Schedule 3 criteria to remain in that relationship in order to have the visa granted to them. This would undermine the reason why the family violence provisions were introduced and therefore this is a compelling reason for not applying the Schedule 3 criteria.
74. There is no legislative provision that provides that if a person has suffered family violence that this, of itself, provides a compelling reason for not applying the Schedule 3 criteria. The quite detailed family violence provisions set out in the legislation do not provide any guidance or direction that if a person is found to have suffered family violence and would meet the time of decision criteria, this provides a compelling reason for not applying the Schedule 3 criteria in order for the applicant to meet the time of application criteria. Each

case is different and when considering whether there are compelling reasons for not applying those criteria the particular circumstance of each applicant must be considered.

75. As set out above, the relationship between the applicant and the sponsor appears to have been dysfunctional from when it started in 2014, four years before the application was made. The applicant applied for and was granted an AVO for her protection from the sponsor in 2015. The applicant claimed that she was the victim of family violence throughout the relationship. At the time the application was made, the applicant had already had a period of separation from the sponsor and had been the victim of family violence committed by the sponsoring partner. She indicated that her daughter was no longer speaking to her because she was upset about the applicant marrying the sponsor.
76. The Tribunal accepts that many individuals will often feel compelled to remain in a violent relationship even when given the opportunity to leave that relationship. The dynamics of a relationship and the effect on a person who is in a violent relationship are complex and multifaceted. It is difficult and is likely to be impossible to fully understand why the applicant would have reconciled her relationship with the sponsor in 2015 after she obtained an AVO for her protection from him at that time or why she would have married him in 2017 if, she claimed, he abused her throughout the relationship. Her response when questioned by the Tribunal was simply that "she was blind in life and in love". It may also have been that she considered this was her best opportunity to be able to remain in Australia having had her Protection visa application refused by the Department and that decision affirmed by the Tribunal on review.
77. In considering the whole of the relationship between the applicant and the sponsor, as claimed by the applicant, the Tribunal is not satisfied that the fact that the applicant has suffered relevant family violence and has obtained an AVO for her protection from the applicant on two occasions, the first in 2015 and the second in 2019, provides a compelling reason for not applying the Schedule 3 criteria.
78. At the time of the application, the applicant was already in a dysfunctional and violent relationship and had already obtained an AVO against the sponsor. It is not the case that after the application had been made the applicant discovered that she was in a violent relationship and needed to exit that relationship for her own safety. The applicant had already been given the protection of the courts and the assistance of the police to be able to exit any claimed relationship she had with the sponsor prior to the application being made. The behaviour of the sponsor as claimed by the applicant appears to have been continuation of the conduct of the sponsor towards the applicant that had commenced soon after it was claimed the relationship started. The relationship appears to have ended within six months of the application being made. As the relationship has now ended, the applicant would not be able to apply for a Partner visa if she returned to Georgia based on any claimed relationship she has or had with the sponsor. The purpose of a Partner visa is to allow people in a genuine and continuing relationship to live together in Australia. There is nothing to indicate that the applicant would meet any criteria for the grant of any visa to be able to reside in Australia.
79. As set out above, the applicant appears to have been in a dysfunctional and violent relationship with the sponsor from 2014, almost four years before the parties were married and the application was made. The dysfunctional and violent nature of that relationship was present at the time of the application and continued after that until the parties separated in about September 2018, six months after the application was made. The Tribunal accepts that the applicant does not meet the criteria for the grant of any visa to be able to remain in Australia or, if she departed Australia, for the grant of any visa while outside Australia to be able to reside in Australia. The Tribunal is not satisfied, however, that in the circumstances and taking into account the history of the claimed relationship, the fact that the applicant has

suffered family violence provides a compelling reason for not applying the Schedule 3 criteria. Further, the Tribunal is not satisfied that the fact that the applicant is unlikely to meet the criteria for any other visa to be able to reside in Australia provides a compelling reason for not applying the Schedule 3 criteria.

80. The applicant claims to be suffering from various mental health issues as well as being diagnosed with [medical conditions]. The applicant has accessed various health and welfare services in Australia. She has consulted [Doctor B], consultant psychiatrist, and [a named] optometrist for treatment. She had involuntary admissions to psychiatric wards of major hospitals. She is receiving continuing treatment for both her mental health issues and from the optometrist. [Ms B], her counsellor and mental health therapist, gave evidence to the Tribunal and has provided a number of statements in support of the applicant. She described the applicant as “an extremely intelligent” [age]-year-old woman who was the victim of significant domestic violence over a period of six years.
81. The applicant has been able to access these services in Australia based on her involuntary admission to [Hospital A] and her own resourcefulness and being able to locate these services. She was able to find free and then subsidised housing in [Suburb 2]. She was able to contact police to be able to make allegations against the sponsor of assault and obtain AVOs for her protection from the sponsor. It appears that both AVOs obtained by the applicant were made by consent of the sponsor. There is nothing to indicate that despite the allegations made by the applicant, the sponsor was convicted or even charged with assault or any other criminal offence arising from those allegations. The applicant was able to access and provide instructions to obtain a victims’ compensation payment of \$[amount] as a result of the allegations she made against the sponsor.
82. Although it has been claimed that the applicant would not be able to receive appropriate treatment in Georgia, there is nothing to support this claim. The evidence of [Ms B] to the Tribunal was not that Georgia did not have appropriate medical facilities, it was just that the applicant would have to pay for any treatment in Georgia whereas she could access free medical treatment in Australia.
83. Country information indicates that there have been significant steps toward safeguarding the right to health in Georgia since 2013¹. This is also reflected in the report from the World Health Organisation in 2018 where it was reported that considerable policy strides had been made in Georgia to transform services delivery based on primary health care approach and embracing universal health coverage². It was indicated that health needs and the burden of diseases have drastically changed, and the Georgian healthcare system is straining to keep pace with those changes. Despite this, the healthcare system appears adequate, with suitable access to Georgian citizens to subsidised, if not free, healthcare facilities.
84. The Tribunal accepts that healthcare services in Australia may be superior to those in Georgia and that the applicant may have to meet some of the expenses of any healthcare provided to her in Georgia, whereas she has been able to access free health care in Australia. The Tribunal is not satisfied, however, that the disparity in the healthcare services the applicant may access in Georgia as compared to Australia provides a compelling reason for not applying the Schedule 3 criteria. Those health services are available to the applicant in Georgia. She has the support of her son in Georgia who the applicant described as a “smart” [professional] who would be able to assist her in accessing any health services she required. Her [sibling] remains living in Georgia and works and lives [alone]. The applicant has provided no information which would indicate that she would not be able to access

¹National Report submitted in accordance with paragraph 5 of the annexe to Human Rights Council resolution 16/21 dated 18 –29 January 2021 –Human Rights Council at page 13.

²World Health Organisation –Quality of primary health care in Georgia, 2018 at 1.

health services in Georgia or obtain the medication she receives. There is no information that she would not have support from her relatives in Georgia.

85. The applicant's son and daughter continue to reside in Georgia. The applicant claimed she did not have any continuing contact with her daughter as her daughter had not forgiven her for getting married in Australia. She said that she speaks to her son almost every day and he works as a [professional]. She was not able to provide any details of his work, simply describing him as a "smart" [professional]. The applicant divorced her first husband in Georgia in 2017. She explained that the divorce was granted on her application. She relied upon the assistance of her son to obtain the necessary documentation and make the application. The fact that the applicant's son in Georgia has provided her the assistance in order to obtain the divorce from her first husband indicates that it is likely that he would provide continuing assistance to his mother if she returned to Georgia. The applicant said her son does not have any problems living in Georgia and that he has travelled overseas on a number of occasions, but was not sure where and the travel was not to Australia. There is nothing to indicate that the applicant's son and his family have any difficulties living in Georgia or that they are at risk of persecution or at real risk of harm for any reason associated with any actions of the applicant or for any reason at all.
86. The applicant previously applied for a Protection visa arguing that she would face persecution in Georgia and faced a real risk of suffering significant harm in Georgia. This application was refused by the Department. A review by the Tribunal (differently constituted) comprehensively considered the claims made by the applicant and a detailed decision was made by the Tribunal affirming the Department's decision to refuse the application. An appeal by the applicant against the Tribunal's decision was withdrawn by the applicant.
87. The applicant has provided no further information to substantiate any claim that she would face any persecution in Georgia or that there is a real risk that she would suffer significant harm in Georgia or any harm at all. There is nothing to indicate the decision of the Tribunal to affirm the Department's decision to refuse the application was not correct. There is no information to undermine the findings of the Tribunal in respect of the claims made by the applicant.
88. The applicant travelled to [Country 2] and [Country 3] in 2012. The Tribunal does not accept that if the claims made by the applicant as to the reasons why she is not able to return to Georgia were genuine that she would not have applied for protection in [Country 2] or [Country 3] when she was in those countries in 2012. The fact that she travelled overseas and then returned to Georgia in 2012, the year before she travelled to Australia, undermines the claim that she faces any persecution or real risk of significant harm or any harm in Georgia.
89. After applying for the Partner visa, the applicant's agent wrote to the Department requesting her Bridging visa be varied to enable her to travel overseas and then return to Australia. The basis of this claim was, her agent claimed, that the applicant "wishes to travel to Georgia for a short period to visit family". The fact that the applicant was requesting in August 2018 to be able to return to Georgia to spend time with her family indicates the claims that she made that she faced any persecution or any risk of significant harm in Georgia were not credible. If the claims made by the applicant were genuine, the applicant would not be seeking to return to Georgia, particularly if she claimed to the Tribunal that she expected that if she returned to Georgia she would be immediately arrested. If she wished to visit her family but feared returning to Georgia, she would be able to see them in a third country as she stated that her son had travelled overseas on other occasions. This further undermines the claims that the applicant faces any harm in Georgia from any individual or group.

90. The applicant claimed that her agent's statement that she wished to travel to Georgia was not correct. She claimed instead that it was her sponsor who wanted them both to travel to [Country 1] so that the applicant could meet his family there. The fact that the applicant is now claiming that the information provided on her instructions to her agent was incorrect is a further indication that the applicant is willing to provide false information to the Department, believing that if she provided the correct information "it would not go as well as expected". The Tribunal finds the most likely explanation is that the applicant did wish to visit her family in Georgia and that she had no fears of returning to Georgia.
91. The Tribunal is not satisfied that the situation the applicant would face if she were required to return to Georgia provides a compelling reason for not applying the Schedule 3 criteria. The Tribunal does not accept that the applicant faces any persecution or that there is a real risk of significant harm or any harm should the applicant be returned to live in Georgia. The Tribunal finds the applicant has the support of her son and it is likely he would be able to provide both financial and emotional support for the applicant. The Tribunal does not accept that the applicant is of any interest to any individual or group in Georgia or that she would have any difficulties returning to or living in Georgia. The Tribunal is not satisfied the situation the applicant would face in Georgia provides a compelling reason for not applying the Schedule 3 criteria.
92. The Tribunal has assessed the circumstances of the applicant and the sponsor both individually and cumulatively. As set out above, the Tribunal is not satisfied that the individual circumstances of the parties, and in particular the claims made by the parties when considered on an individual basis, provide a compelling reason for not applying the Schedule 3 criteria. The Tribunal is not satisfied that when considered in combination, the total circumstances of the parties provide a compelling reason for not applying the Schedule 3 criteria.
93. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii). There is nothing before the Tribunal to indicate the applicant would meet any of the alternate criteria in cl.820.211.
94. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

95. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Hugh Sanderson
Member